



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

November 18, 2004

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Environmental Justice News from August 30, 2004 to October 27, 2004

FROM: Nicholas Targ, Counsel
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This summarizes select environmental justice news from August 30 through October 27, 2004. Except as noted, this review is confined to Lexis/Nexis queries conducted under the following search: “(environment! w/2 (justice or racism or equity or disproportionate or disparate)) or (environment! w/50 minorit! or low***income) or (executive order 12898) or (civil right! w/50 environmental)”. Please note that we have not included multiple articles covering the same topic.

For the period ending October 27, 2004, the following news is current:

A. News

1. “Two Grants Promoting Healthy Communities Awarded in New Hampshire,” States News Service, Manchester, New Hampshire (October 27, 2004).

EPA New England awarded two “Healthy Community Grants,” of approximately \$30,000 each, to the City of Manchester Health Department and the Healthy First Family Care Center of Franklin. “From reducing lead poisoning to preventing asthma attacks, these groups are doing a great job of creating healthy, liveable and safe communities in New Hampshire,” the article quotes Robert W. Varney, Regional Administrator, of EPA’s New England office as stating. Both grants will be used to address lead and/or asthma issues facing at-risk children and their families.

2. “Applause,” Times-Picayune, New Orleans, Louisiana, (October 14, 2004).

The Louisiana Environmental Action Network awarded Darryl Malek-Wiley of the Sierra Club with the Ramona Stevens Solidarity Award. “The award recognizes exceptional efforts to build alliances between labor and environmental groups. Malek-Wiley was honored for 30 years of activism and work with communities along the Mississippi River to fight the causes of toxic pollution in their areas.”

3. “A Pathfinder in Kenya,” Boston Globe, Boston, Massachusetts (October 9, 2004).

Wangari Maathai, a Kenyan environmentalist and human-rights activist and member of Kenya's Parliament, received the Nobel Peace Prize for her work on the issues of deforestation, corruption, and empowering women in Africa. “Archbishop Desmond Tutu of South African, a fellow Nobel laureate visiting Boston yesterday, said that the innovative award by the Nobel Committee to Maathai recognizes environmental justice as essential for peace.”

4. “Cheyenne River Indian Reservation: Tribe Receives \$920,000 Environmental Grant,” Aberdeen American News (October 2, 2004).

The National Institutes of Health awarded a \$920,000 environmental justice grant to the Cheyenne River Sioux Tribe of South Dakota. The article reports that grant will “address various environmental health issues resulting from such things as 100 years of open-pit and subterranean mining in the Black Hills and flooding of reservation land for dam construction...”

5. “Final Policy Statement on Environmental Justice,” Nuclear News (October 2004) [NT Notes: See summary of NRC Statement item B.3].

The Nuclear Regulatory Commission's final policy statement on environmental justice was published in the Federal Register on August 24, 2004, with little changes from the 2003 proposed version, the article reports. “Comments on the draft were varied, with some arguing that the statement would not adequately defend the interests of minority and poor communities in environmental reviews, and others warning that it would create a new category of rights to impede the development of nuclear facilities.”

6. “Wilmington Refinery,” City News Service, (September 20, 2004).

The article reports that Los Angeles City Attorney Rocky Delgadillo’s environmental justice unit charged Praxair, Incorporated, a Wilmington refinery, with 109 misdemeanor environmental violations based on alleged unlawful discharges into storm drains. “Industrial polluters that contaminate our water systems threaten the health and safety of the children in some of our most disadvantaged neighborhoods,” Delgadillo is quoted as saying. According to the article, three of the counts relate to an August 2002 spill of up to 12,000 gallons of liquid containing copper, lead, zinc, nickel and residual chlorine...

7. Debra Dominguez, “State Looks at Environmental Justice in Listening Session,” Albuquerque Journal, Albuquerque, NM (September 17, 2004).

On September 17, 2004, the New Mexico Environment Department sponsored an Environmental Justice listening session in Albuquerque. The session is part of a state-wide plan to study and address the issue of environmental justice. Derrith Watchman-Moore, the New Mexico Environment Department Deputy Secretary, is reported as saying that, “By investigating

and addressing these issues, NMED hopes to ensure that no community is forced to shoulder a disproportionate burden of pollution or environmental harm.” The article also reports that Richard Moore, Executive Director of the Southwest Network for Environmental and Economic Justice, affirmed the work of the State of New Mexico, stating that, “There’s no question about it, we’re seeing much more of a commitment from them than we’ve seen in past years.”

B. Legislative/Regulatory/Programmatic–

1. California Water Security and Environmental Enhancement Act, P.L. 108-136, Section 104(e)(1)&(2), introduced as H.R. 2828 by Senator Diane Feinstein (D-CA) on May 21, 2003, and Representative Kenneth Calvert (R-CA) on July 23, 2003. Status: Enacted (Oct. 25, 2004). [NT NOTES: This Act is the first piece of substantive legislation to address expressly “Environmental Justice.”]

This Act, which enacts provisions pertaining to the California Bay Delta Agreement, among other things, requires compliance with specific management practices addressing environmental justice. Specifically, the statute provides that, “The Federal agencies, consistent with Executive Order 12898 (59 Fed. Reg. 7629), should continue to collaborate with State agencies to– (1) develop a comprehensive environmental justice workplan for the Calfed Bay-Delta Program; and (2) fulfill the commitment to addressing environmental justice challenges referred to in the Calfed Bay-Delta Program Environmental Justice Workplan, dated December 13, 2000.”

2. S. 2691, Long Island Sound Stewardship Act of 2004, introduced by Senator Joseph Lieberman (D-CT), on July 20, 2004. Status: Passed the Senate with Unanimous Consent on Oct. 11, 2004. Companion bill H.R. 4876, introduced by Representative Robert Simmons (R-CT), pending in the House Committee on Resources.

The bill would establish an advisory committee that would, among other things, make recommendations to the Environmental Protection Agency regarding the allocation of grants for land and conservation easement acquisition in the Long Island Sound estuary area. The bill provides, at §3(d)(1)(A)-(G), that “Natural Resource-Based Recreation Areas” should be identified based on “environmental justice,” among other factors.

3. Nuclear Regulatory Commission (NRC), Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040 (Aug. 24, 2004).

The NRC Policy provides that issues of environmental justice will be identified and addressed through the National Environmental Policy Act (NEPA), rather than through a separate process. The policy states that “[t]he Commission recognizes that the impacts, for NEPA purposes, of its regulatory or licensing actions on certain populations may be different from impacts on the general population due to a community’s distinct cultural characteristics or practices. Disproportionately high and adverse impacts of a proposed action that fall heavily on a particular community call for close scrutiny—a hard look—under NEPA. While Executive Order (E.O.) 12898, ‘Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,’ characterizes these impacts as involving an ‘environmental justice’ matter, the NRC believes that an analysis of disproportionately high and adverse impacts needs

to be done as part of the agency's NEPA obligations to accurately identify and disclose all significant environmental impacts associated with a proposed action. Consequently, while the NRC is committed to the general goals of E.O. 12898, it will strive to meet those goals through its normal and traditional NEPA review process.”

3. California, 2004 Cal ALS 716; 2004 Cal SB 117; Stats 2004 ch 716, introduced as SB 117 by Senator Michael Machado (D-Senate District 05). Status: Enacted (Sept. 23, 2004).

Amending the Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002, the legislation would permit financing of safe drinking water, water quality, and water reliability programs without local matching funds. The amendment would also require State agencies, “to the maximum extent feasible, to provide outreach to disadvantaged communities to promote access to relevant grant application and award information.” Upon signing the bill into law Governor Schwarzenegger transmitted the following memorandum to the California State Senate:

I am signing Senate Bill 117 stating the intent of the legislature to encourage state agencies provide outreach to disadvantaged communities and consider waiving matching fund requirements while implementing grants from the Water Security, Clean Drinking Water, Coastal and Beach Protections Act of 2002 (Proposition 50).

Environmental justice and outreach to economically disadvantaged communities should be encouraged by all state agencies. California Environmental Protection Agency is leading an ambitious effort to address the environmental impacts and risks faced by Californians of low-income and ethnically diverse populations. Recent advances include establishing an Environmental Justice Program within the Office of the Secretary, convening an Interagency Working Group on Environmental Justice, appointing community stakeholders to an Advisory Committee on Environmental Justice, and implementing an Environmental Justice Action Plan. . . .

4. California, 2004 Cal AB 0389, “California Land Reuse and Revitalization Act of 2004,” introduced by Assemblywoman Cindy Montanez (D-39th Dist). Status: Enacted (Sept. 23, 2004).

This Act, among other things, would immunize innocent purchasers, bona fide purchasers, or contiguous property owners, who meet specified conditions, from contribution actions or being subject to take response actions under California’s hazardous substances clean-up laws. It also codifies protection offered under prospective purchaser agreements, and establishes, under § 25395.119, a “brownfields ombudsperson, when funds become available, whose responsibilities shall include, but are not limited to, all of the following: ... (5) Facilitating and advocating that the issue of environmental justice for communities most impacted, including low-income and racial minority populations, is considered in brownfields activities of each office, board, and department within the California Environmental Protection Agency.”

C. Litigation–

1. *Cox v. City of Dallas*, Civil Action No. 3:98-CV-1763-BH 2004 U.S. Lexis 18968 (N.D. Tex., Sept. 21, 2004).

Residents of an African American community in Dallas, Texas, alleged violations of the Equal Protection Clause of the Fourteenth Amendment, asserting that the City of Dallas impermissibly discriminated against the residents by failing to stop illegal waste disposal within their community. The court held that to prevail the plaintiffs had to prove three factors: (1) the action was the result of an official agency decision; (2) the City intended to discriminate against plaintiffs based on race; and (3) the action violated the Equal Protection Clause. While the court found that the action was the result of an agency decision, and that “the City’s efforts to stop the illegal dumping at Deepwood were inconsistent, inadequate, and largely ineffective,” the court found that the residents did not show that “these failures were the result of a widespread practice attributable to the City Council or to the Board of Adjustment of not using the City’s zoning land use power to protect African American neighborhoods.” Finally, the court concluded, under the *Arlington Heights*, factors that although the “illegal dumping... had a disproportionate impact on African Americans,” none of the other factors suggested that the failure to take more appropriate action was caused by a discriminatory intent.

2. *Lopez v. City of Dallas*, Docket No. 3:03-CV-2223-M, 2004 US Dist. Lexis 18220 (ND Tex. September 9, 2004) [NT NOTES: *There appears to be a split, not only within the circuits, but also within the Northern District of Texas, as to the scope of the Fair Housing Act. Compare, Lopez v. City of Dallas, with Cox v. City of Dallas, 2004 U.S. Dist. LEXIS 2729, No. 3:98-CV-1763-BH, 2004 WL 370242, at *7-8 (N.D. Tex. Feb. 24, 2004) (narrowly construing the applicability of the Fair Housing Act)*].

The district court granted and denied, in part, the City of Dallas’ motion to dismiss African American residents’ claims of illegal discrimination under the Fair Housing Act (FHA) and Title VI of the Civil Rights Act of 1964. Of particular note, the court denied the City’s motion to dismiss the plaintiffs’ claim that the City “violated the [FHA, 42 U.S.C. § 3604(b),] by providing different and inferior municipal services to the dwellings in Cadillac Heights because of the race of its residents.” Finding that the provision of the FHA at issue should be read broadly enough to encompass the plaintiffs’ claim, the court noted that “[t]here is a split in authority about whether the discriminatory provisions of municipal services to residents is action under § 3604(b).” The Fourth and Seventh Circuits have held that such discrimination is actionable, whereas, the Federal Circuit has held that the FHA does not cover municipal services discrimination, “unless the services are provided in connection with the sale or rental of housing.” Interpreting the language of the FHA under the meaning given to it by the Department of Housing Urban Development (HUD), the court found that the while the Federal Circuit articulated the correct standard, HUD interprets the phrase, “in connection with the sale or rental of a dwelling,” to include the “use of services associated with a dwelling,” generally.

3. *In the Matter of Dow Chemical Co., Louisiana Operations Complex Cellulose and Light Hydrocarbons Plants, Part 70 Air Permit Major Modifications and Emissions Versus*

Reduction Credits, Docket Number 2003 CA 2278 2003 2278 (La. App. 1 Cir, September 17, 2004), 2004 La. App. LEXIS 2134.

On appeal from the trial court, the intermediate-level appellate court considered whether the Louisiana Department of Environmental Quality (DEQ) properly applied emissions reductions credits to a Dow Chemical facility operating in Plaquemine, Louisiana, and whether DEQ adequately considered the facility's impact on human health and the environment. Finding that the credits had been applied properly, the appellate court reviewed the DEQ's record with respect to the facility's effects. The court found, "that the DEQ painstakingly conducted and documented its thorough analysis, which considered the background, public comment, public comment response summary, alternative sites, alternative projects, mitigating measures, avoidance of adverse environmental effects, cost/benefit analysis, social and economic benefits, and environmental justice/civil rights Title IV issues as mandated by the Louisiana Supreme Court in *Save Ourselves, Inc.* In so doing, the DEQ sufficiently addressed (1) the potential and real adverse environmental effects of the proposed project have been avoided to the maximum extent possible; (2) a cost-benefit analysis of the environmental impact costs balanced against the social and economic benefits of the project demonstrates that the latter outweighs the former; and (3) alternative projects or alternative sites or mitigating measures that would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits to the extent applicable."

4. *In the Matter of the Application of the City of New York Department of Sanitation for a Solid Waste Management Permit pursuant to Environmental Conservation Law article 27 (Spring Creek Yard Waste Composting Facility), DEC Application No. 2-6105-00666/00001, 2004 N.Y. ENV LEXIS 59 (August 30, 2004).*

The New York Department of Environmental Conservation (NYDEC) considered objections to an application for a proposed a 19.6 acre composting facility in Brooklyn. The reviewing Administrative Law Judge (ALJ) accepted for adjudication a number of unspecified issues raised under the rubric of environmental justice. The ALJ, however, noted that the project application was not subject to the State's environmental justice policy, which was enacted following the submission of the proposal. However, the ALJ identified sources of authority under which environmental justice issues could be considered, independent of the State's environmental justice policy, including: (1) "the general authority, under ECL 3-0301(1)(b), to 'promote and coordinate the management of water, land, fish, wildlife and air resources to assure their protection, enhancement, provision, allocation, and balanced utilization consistent with the environmental policy of the state and take into account the cumulative impact upon all of such resources in making any determination in connection with any license, order, permit, certification or other similar action...'; and (2) the State Environmental Quality Review Act. Finally, the ALJ questioned whether the State could require an applicant to engage in additional public participation procedures, pursuant to the State environmental justice policy. The ALJ stated, "it is not clear whether the Department could require an applicant to carry out an enhanced public participation plan to the full extent required by the policy (see, CP-29, at 8) if an applicant resisted doing so. The policy is a guidance document, not a regulation."